

**United States Department of Labor
Employees' Compensation Appeals Board**

K.T., Appellant

and

**DEPARTMENT OF THE ARMY, AVIATION
& MISSILE COMMAND, Corpus Christi, TX,
Employer**

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**Docket No. 16-0677
Issued: June 16, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 22, 2016 appellant filed a timely appeal from a February 9, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated January 30, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant argues that OWCP failed to state the basis for its February 9, 2016 decision and requests a reconsideration of her claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 22, 2013 appellant, a 52-year-old aircraft production controller, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment, including repetitive typing, keypunching, and other computer work.

Appellant submitted an April 24, 2013 report from Dr. James Key, a Board-certified orthopedic surgeon, who diagnosed bilateral carpal tunnel syndrome, bilateral medial epicondylitis, and bilateral lateral epicondylitis. Dr. Key opined that appellant's conditions were occupational, work-related injuries caused by repetitive keypunching and constant use of a computer at work.

By decision dated July 9, 2013, OWCP denied appellant's claim finding the factual evidence of record insufficient to establish that the work injury occurred as alleged.

On October 28, 2013 appellant requested reconsideration and submitted a narrative statement indicating that 90 to 95 percent of her job required use of a typewriter, keypunch, or computer. She also submitted electrodiagnostic studies dated November 7, 2012 which revealed evidence of a mild-to-moderate bilateral carpal tunnel syndrome. In an October 21, 2013 report, Dr. Key reiterated his opinion that appellant's occupational overuse of the hands, wrists, and elbows caused bilateral carpal tunnel syndrome.

By decision dated January 30, 2014, OWCP denied modification of the claim finding that the medical evidence of record failed to establish a causal relationship between appellant's conditions and the accepted factors of her federal employment.

On December 18, 2015 OWCP received appellant's December 14, 2015 request for reconsideration and submitted an April 7, 2014 report from Dr. Thomas Martens, a family practitioner, who diagnosed bilateral carpal tunnel syndrome and opined that appellant's medical condition was a direct result of performing continuous and repetitive duties of constant typing into the computer and making handwritten entries into a log book at work for the past 33 years. She also submitted a June 22, 2015 report from Dr. Key who reiterated his medical diagnoses and opinions.

By decision dated February 9, 2016, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error. OWCP noted that it had reviewed the evidence submitted to determine whether its January 30, 2014 decision was incorrect.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation provides that an application

² See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

for reconsideration must be submitted within one year of the date of the OWCP decision for which review is sought.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁵

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹³

⁴ 20 C.F.R. § 10.607(a).

⁵ See *Jesus D. Sanchez*, *supra* note 2; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

⁶ 20 C.F.R. § 10.607(b).

⁷ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

⁸ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

⁹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to timely request reconsideration. OWCP's regulations¹⁴ and procedures¹⁵ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's January 30, 2014 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since appellant did not file her request until December 18, 2015, it was filed outside the one-year time period. As appellant's December 18, 2015 request for reconsideration was received more than one year after the January 30, 2014 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹⁶

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's January 30, 2014 decision or shift the weight of the evidence in her favor.

In his April 7, 2014 report, Dr. Martens diagnosed bilateral carpal tunnel syndrome and opined that appellant's condition was a direct result of performing continuous and repetitive duties of constant typing into the computer and making hand-written entries into a log book at work for the past 33 years. The term clear evidence of error is intended to represent a difficult standard.¹⁷ A detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.¹⁸ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁹ While Dr. Martens' report is generally supportive of causal relationship, it does not demonstrate clear error on the part of OWCP in rendering its January 30, 2014 decision. Thus, the Board finds that the report of Dr. Martens is insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's January 30, 2014 merit decision.

The June 22, 2015 report from Dr. Key is repetitive of reports previously of record and does not show error with respect to the January 30, 2014 decision.²⁰ The Board has held that repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the

¹⁴ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2004); *see Veletta C. Coleman*, *supra* note 12.

¹⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); *see Dean D. Beets*, *supra* note 7.

¹⁸ *See D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹⁹ *See M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²⁰ *See L.M.*, Docket No. 14-1738 (issued March 3, 2015) (where the claimant resubmitted medical reports previously of record, the Board found that the evidence was duplicative and failed to establish clear evidence of error).

claimant.²¹ Appellant has not explained how the submission of this report raises a substantial question concerning the correctness of OWCP's decision.

The Board finds that the evidence submitted is insufficient to *prima facie* shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred in its January 30, 2014 decision.

On appeal, appellant argues that OWCP failed to state the basis for its February 9, 2016 decision and requests a reconsideration of her claim. The Board finds that OWCP's February 9, 2016 decision denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error and explained that it had reviewed the evidence submitted to determine whether its January 30, 2014 decision was incorrect. The Board noted above that it only has jurisdiction over OWCP's February 9, 2016 nonmerit decision which denied appellant's request for reconsideration and therefore is precluded from conducting a merit review. As explained, the evidence provided by appellant is insufficient to shift the weight of the evidence in her favor and does not demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

²¹ See *D.E.*, 59 ECAB 438 (2008); *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board